

SERVICE DATE – SEPTEMBER 15, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42141

NATIONAL RAILROAD PASSENGER CORPORATION—INVESTIGATION OF
SUBSTANDARD PERFORMANCE OF THE CAPITOL LIMITED

Decided: September 14, 2016

This decision removes this proceeding from abeyance and orders the National Railroad Passenger Corporation (Amtrak) to submit evidence demonstrating that the on-time performance (OTP) of its Capitol Limited service has averaged less than 80% for any two consecutive calendar quarters under the definition of, and the formula for calculating, on-time performance adopted by the Board in On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008, EP 726 (STB served July 28, 2016) (to be codified at 49 C.F.R. Part 1040).

BACKGROUND

By complaint filed on November 17, 2014, as amended on November 19, 2014, Amtrak requested that the Board initiate an investigation pursuant to the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f), of alleged substandard performance of Amtrak's Capitol Limited service between Chicago, Ill., and Washington, D.C. Amtrak alleges in its complaint that the OTP of the Capitol Limited service, which operates over tracks of CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NSR), has averaged less than 80% for two consecutive calendar quarters. On January 7, 2015, CSXT and NSR each filed a response to Amtrak's complaint.¹ At the request of the CSXT and NSR, the Board held Amtrak's complaint in abeyance for mediation. Ultimately, however, the discussions were unsuccessful.

On May 15, 2015, in response to a petition filed by the Association of American Railroads, the Board instituted a rulemaking proceeding in Docket No. EP 726 to define "on time" and specify the formula for calculating "on-time performance" for purposes of determining

¹ CSXT and NSR also each filed a motion to dismiss Amtrak's complaint on January 7, 2015, in which the parties argue that the Board lacks the authority to establish an OTP standard itself and adjudicate OTP cases absent a valid OTP standard established under the mechanism provided under Section 207 of PRIIA. Amtrak replied to each motion to dismiss on January 27, 2015. The Board addressed the issue of its authority to promulgate OTP rules in its decision adopting the Final Rule in Docket No. EP 726. The Board will address the motions to dismiss and any other outstanding requests in a subsequent decision.

whether the “less than 80 percent” threshold that Congress set for bringing an on-time performance complaint has been met under Section 213 of PRIIA. See On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008, EP 726 (STB served May 15, 2015). On December 28, 2015, the Board issued a Notice of Proposed Rulemaking and solicited comments in Docket No. EP 726. Also on December 28, 2015, the Board held this proceeding in abeyance pending further Board order, in light of the rulemaking and its relevance to the issues raised in this proceeding. On July 28, 2016, the Board issued a Final Rule in Docket No. EP 726, which took effect on August 27, 2016. Petitions for judicial review of the Final Rule have been filed in the U.S. Courts of Appeals for the Eighth Circuit² and the District of Columbia Circuit,³ and have been consolidated in the Eighth Circuit.

DISCUSSION AND CONCLUSIONS

Under Section 213(a) of PRIIA, 49 U.S.C. § 24308(f)(1), if the OTP of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board, upon complaint by Amtrak, must initiate an investigation to determine whether and to what extent delays are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or by Amtrak or other intercity passenger rail operators. Following the investigation, should the Board determine that Amtrak’s substandard performance is “attributable to” the rail carrier’s “failure to provide preference to Amtrak over freight transportation as required” by 49 U.S.C. § 24308(c), the Board may “award damages” or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. § 24308(f)(2).

Under the Final Rule adopted in Docket No. EP 726, an intercity passenger train’s arrival at, or departure from, a given station is “on time” if it occurs no later than 15 minutes after its scheduled time. 49 C.F.R. § 1040.2. Calculation of the quarterly OTP is based on a train’s actual departures from its origin and arrivals at all intermediate stations and its destination—i.e., an “All-Stations OTP” calculation (as opposed to arrivals at endpoint termini only, i.e., an “Endpoint OTP” calculation). 49 C.F.R. § 1040.3.

Before the Board may initiate an investigation under § 24308(f) in this proceeding, Amtrak must show that the “less than 80 percent” threshold for bringing an OTP complaint for its Capitol Limited service has been met. Although containing evidence to that effect,⁴ Amtrak’s

² Union Pac. R.R. v. STB, No. 16-3307 (8th Cir. filed Aug. 5, 2016).

³ Ass’n of Am. R.R.s v. STB, Nos. 16-1279 et al., (D.C. Cir. filed Aug. 8-9, 2016 (consolidated)).

⁴ Amtrak’s complaint requests that the Board initiate an investigation pursuant to 49 U.S.C. § 24308(f) and, in turn, the OTP metrics and standards jointly developed by Amtrak and the Federal Railroad Administration, pursuant to Section 207 of PRIIA. However, the constitutionality of those standards has been challenged in court, and they are currently invalid. See Ass’n of Am. R.R.s v. Dep’t of Transp., 821 F.3d 19 (D.C. Cir. 2016), petition for reh’g and reh’g en banc denied mem. In its complaint, Amtrak submitted both All-Station OTP and Endpoint OTP quarterly statistics, from the quarter beginning in July 2011 through the quarter ending in September 2014, to demonstrate that OTP for its Capitol Limited service had been

(continued . . .)

amended complaint preceded the Final Rule, which prescribes a calculation method that is more detailed than the definition of All-Stations OTP used by Amtrak. Furthermore, nearly seven calendar quarters have elapsed since Amtrak's November 2014 evidentiary submission.

Therefore, notwithstanding the evidence already submitted in its amended complaint, Amtrak will be directed to show that the OTP of its Capitol Limited service has averaged less than 80% for any two consecutive calendar quarters as calculated under the OTP Final Rule adopted by the Board in Docket No. EP 726. Amtrak shall indicate which two (or more) consecutive calendar quarters now serve as the basis for its complaint, as well as the specific train numbers to which its complaint applies. Amtrak shall also provide, and explain its calculation of, the denominator, the numerator, and the resulting OTP percentage, as described in 49 C.F.R. § 1040.3, for each applicable quarter, and shall include a verification under 49 C.F.R. § 1112.9. In calculating the OTP percentages, Amtrak should be sure to use the *actual* number of arrivals and departures in both the denominator and the numerator.

Amtrak's submission will be due by October 17, 2016. Should CSXT or NSR wish to reply to Amtrak's filing, they may do so by October 25, 2016.

It is ordered:

1. This proceeding is removed from abeyance.
2. Amtrak is directed to provide, by October 17, 2016, the information described above.
3. CSXT's and NSR's replies, if any, to Amtrak's evidence are due by October 25, 2016.
4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

below the 80% investigation threshold under either method of calculation. (Amtrak Amended Complaint 2, Exhibit B.) Amtrak defined All-Station OTP as "the percentage of station arrivals (and departure from origin station) that occur within 15 minutes of the times on the public schedule." (*Id.* at 2.) Similarly, Endpoint OTP was defined as "the percentage of times [long distance trains, such as the Capitol Limited service] arrived at their terminal station within 30 minutes of the arrival time on the public schedule." (*Id.* at 2-3.)